Republic v Kiogora (Criminal Case 9 of 2017) [2022] KEHC 12383 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEHC 12383 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL CASE 9 OF 2017

HPG WAWERU, J

JULY 27, 2022

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

YUSUF KIOGORA ..... ACCUSED

RULING

1. The accused herein Yusuf Kiogora, is charged with murder contrary to sections 203 and 204 of the *Penal Code*. It is alleged in the amended information dated June 17, 2019 that on September 16, 2017 at Muteithia Village in Timau within Meru County, he murdered one Allan Muriuki. After close of the prosecution case the court put the accused to his defence; he elected to give a sworn statement and call one witness.

2. In the course of cross-examination of the accused, learned prosecution counsel sought to question him upon an alleged statement under enquiry made to the police before he was charged. The accused denied giving any statement to the police at all and stated that none of the signatures appearing on the statement shown to him were his. At this point his learned counsel objected to the prosecution's attempt to cross-examine him upon a statement he had denied was his. The court then invited the learned counsels to make their submissions on the point. I have considered those submissions.

3. It is to be noted that the prosecution did not at any point during presentation of their case seek to introduce in evidence any statement of the accused under inquiry or charge and caution. If they had done so the accused would have had the opportunity to state if he objected to production in evidence of such statement. In case of objection, the court would have had to try the issue of admissibility into evidence of such statement by way of a trial-within-the-trial. In that case the prosecution would have had to bring all relevant witnesses in regard to the recording of the statement, whom the accused through his counsel would have been entitlted to cross-examine. After close of the prosecution case in the trial-within-the-trial, and if the court found the accused had a case to answer in regard to the recording of the statement, the accused would have had the right to testify and call witnesses (if he were

so minded) in regard to the issue of admissibility of the statement. Only after conclusion of that trial-within-the-trial would the court then rule on whether or not the statement was admissible. If it ruled it was admissible, then the statement would be admitted into evidence and be part of the record of the court record and could then be used by the prosecution in cross-examination of the accused.

4. As it is now, the prosecution is seeking to use a statement that the accused has denied is his, to cross-examine him, when the issue of whether or not it is indeed the accused's statement voluntarily given has not and cannot be tried at this late stage. This court simply cannot allow that as it could be gravely prejudicial to the accused. If the prosecution has had in their possession all the time that alleged statement under inquiry, and it contains anything useful to its case, it should have sought to produce it in evidence when presenting its case. It cannot be allowed to use the statement as the accused has denied that it is his statement, and that issue has not, and cannot now, be tried and ruled upon.

5. The court therefore rules that the accused shall not be cross-examined upon a statement he has denied is his, and which has been introduced for the first time at the defence stage. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 20TH DAY OF JULY 2022

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 27TH DAY OF JULY 2022